

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ABKCO MUSIC, INC., et al., : 15-CV-04025 (ER)
Plaintiffs, :
v. :
SAGAN, et al., : 500 Pearl Street
Defendants. : New York, New York
-----X : December 20, 2016

TRANSCRIPT OF CIVIL CAUSE FOR HEARING
BEFORE THE HONORABLE HENRY B. PITMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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transcript produced by transcription service.

1 [Microphones were not working properly.]

2 THE CLERK: ABKCO Music v. Sagan.

3 THE COURT: Thanks.

4 THE CLERK: Counsel, please state your name for the
5 record.

6 MR. SLOTNICK: Barry Slotnick and Tal Dickstein for
7 the plaintiffs.

8 THE COURT: Okay.

9 MR. ELKIN: Michael Elkin and Erin Ranahan from
10 Winston & Strawn, counsel for defendants. Good afternoon,
11 Your Honor.

12 THE COURT: All right. Good afternoon. This is a
13 follow up to the discovery conference that we had about two
14 weeks ago or so. In that regard I received a letter, I think
15 it went up on the ECF. It was filed yesterday by
16 Mr. Slotnick, a letter dated December 19, 2016. It's Docket
17 Item 59. I have not received anything from defendant. I'm
18 not suggesting anything is necessary. I just mention that in
19 case you have filed something, I haven't seen it.

20 MS. RANAHAN: We did, Your Honor. We filed a letter
21 this morning. I'm not sure why --

22 THE COURT: Yeah, do you have a copy of it, please?
23 Thank you. Just give me one second to take a look at this.

24 [Pause in proceedings.]

25 THE COURT: Sorry.

1 [Pause in proceedings.]

2 THE COURT: Mr. Skolnick, when did you get -- I'm
3 sorry, Mr. Slotnick, I apologize -- Mr. Slotnick, when did you
4 get the Winston Strawn letter?

5 MR. SLOTNICK: This morning.

13 Let's turn to the deposition issue first. Let me
14 start with defendants' counsel. What evidence does [sic]
15 defendants have that the oral licenses were in fact provided
16 to defendants' predecessor in interest?

17 MS. RANAHAN: Well, Your Honor, I think that's why
18 we want the depositions. We --

19 THE COURT: Well, no -- but I mean you did -- your
20 client did due diligence before it bought the archives, and
21 presumably had some basis to believe it had the rights that
22 it's now claiming to have?

23 MS. RANAHAN: Right. And there are -- there are
24 some that it knows -- and I know Mr. Elkin was talking about
25 this last time in prior cases, and the [inaudible] of an

1 artists that aren't at issue here. But based on the facts as
2 developed, what was happening during that time, Bill Graham
3 was openly and notoriously taping these concerts and was
4 getting -- in some instances at least -- some oral approval
5 from the recording artists [inaudible] --

6 THE COURT: Well, is there any -- is there any
7 evidence in your possession right now that Keith Richards gave
8 the oral license that your client believes was given?

9 MS. RANAHAN: We don't have written evidence of
10 that, no.

11 THE COURT: No, but I mean is there a memo to the
12 file somewhere that, you know, that this grant of permission
13 did in fact take place? I mean did somebody -- in other
14 words, what -- let me put it more directly. What reason does
15 your client have to believe that its predecessor in interest
16 did in fact get the rights that you believe your predecessor
17 had?

18 MS. RANAHAN: Sure. The predecessor in interest,
19 Bill Graham, in particular had a really close relationship
20 with a lot of these artists. He was actually the manager of
21 some artists that he had concerts for. And he was so closely
22 involved in the show that he would announce the performers and
23 he would be really involved in the recording of it. So he was
24 the type of concert promoter that was close to the artists.
25 So to the extent he was having discussions with these artists,

1 it's our understanding that there's a real possibility that
2 these recordings were created with his consent and knowledge.

3 THE COURT: Well, is there -- Bill Graham has been
4 dead for quite some time. Is there any -- is there any
5 evidence that Keith Richards specifically gave Bill Graham the
6 permission that you think he gave him? I mean, is it just a
7 question -- is it just -- is there any specific evidence? I
8 mean, did he keep any kind of logbook? Is there some notation
9 somewhere? Did he tell somebody contemporaneously, geez, we
10 just got this great license from Keith Richards? I mean --

11 MS. RANAHAN: Sure.

12 THE COURT: -- is there any reason to -- any
13 specific reason to believe that Keith Richards gave the
14 license that your predecessor claims it had?

15 MS. RANAHAN: There's absolutely at least a
16 potential for that. It's hard [inaudible] --

17 THE COURT: Well, there's a potential for anything,
18 I mean --

19 MS. RANAHAN: Right.

20 THE COURT: I'm not trying to be sarcastic --

21 MS. RANAHAN: Right.

22 THE COURT: -- but --

23 MS. RANAHAN: Right.

24 THE COURT: -- you know, there's a potential --

25 MS. RANAHAN: Well, Your Honor, as far as Keith

1 Richards --

2 THE COURT: -- for the Chicago Cubs.

3 MS. RANAHAN: -- as far as Keith Richards, based on
4 the history I mean it's our position at this point that
5 plaintiffs wouldn't necessarily be in a position to help us
6 cooperate with Keith Richards. We're no longer seeking this
7 Court's permission to take more than ten depositions.

8 So what we're going to do, because Keith Richards
9 does have a very tense history with plaintiffs, we're just
10 going to go the normal subpoena route I believe and not go
11 through plaintiffs, or seek their cooperation, or seek to go
12 beyond the ten. If we can get him, we can get him. And it
13 will just be one of our ten. So I think that's where we're at
14 as far as Keith Richards goes. [Inaudible] plaintiffs would
15 have any control over him anyway.

16 Mr. Townsend, on the other hand, he is someone who
17 is not located in the United States. The issue came up --
18 well, as far as Keith Richards, we would like Your Honor to
19 require -- and I know so far plaintiffs have said they'd look
20 into whether there were these agreements, these settlement
21 agreements between --

22 THE COURT: Let me just stop you for one second. So
23 you're no longer seeking leave to take more than ten
24 depositions; is that correct?

25 MS. RANAHAN: At this point, we're not, Your Honor.

1 THE COURT: Okay.

2 MS. RANAHAN: If something else changes, we'll come
3 back and --

4 THE COURT: Fine.

5 MS. RANAHAN: -- but at this point, no.

6 THE COURT: Okay.

7 MS. RANAHAN: We're going to try to just fit them
8 all into the ten.

9 THE COURT: Okay.

10 MS. RANAHAN: If that means subpoenaing Keith
11 Richards as one of those ten, we'll do that without
12 plaintiffs' --

13 THE COURT: Okay.

14 MS. RANAHAN: -- cooperation.

15 THE COURT: All right. So right now you're not
16 seeking any relief from me with respect to Keith Richards?

17 MS. RANAHAN: Correct.

18 THE COURT: Okay. Let's talk about Peter Townsend
19 then. Let me ask the same question about Peter Townsend.

20 MS. RANAHAN: Your Honor, I'm sorry. We would like
21 just those documents. So what we are requesting as part of
22 the Keith Richards investigation is they -- what seems to be
23 some missing publishing rights documents and settlement
24 documents between plaintiffs and Keith Richards [inaudible]
25 these are about songs at issue in this case, and that's the

1 Brown Sugar song.

2 From, you know, the third party sources that we've
3 gathered, it does appear that there's at least a real question
4 about whether Keith Richards maintained those publishing
5 rights. Once we have those documents, it may be that we don't
6 even want to proceed with Mr. Richards. But at this point, it
7 looks like there is a good chance.

8 So we would request that plaintiffs with respect to
9 Keith Richards and Mick Jagger be provided -- or be required
10 to provide the settlement agreements that took place between
11 plaintiff ABKCO and Keith Richards and Mick Jagger to the
12 extent they cover songs in this action, and we believe Brown
13 Sugar is one of them.

14 THE COURT: All right. Have those documents been
15 requested or is it your position they're part of the 26(a)(1)
16 disclosures or something else?

17 MS. RANAHAN: They've been requested as far as the
18 ownership chain of title documents. And plaintiffs have -- we
19 just talked about it in fairness for the first time on
20 Saturday. And they said they'd look into it. So we just
21 haven't heard back from them.

22 THE COURT: All right. Well, let me come to
23 plaintiffs then.

24 With respect -- and I appreciate what I've just been
25 told, the issue was just raised four days ago -- with respect

1 to Keith Richards, I guess the issue now is just documents,
2 they're not seeking any relief right now with respect to
3 deposing Mr. Richards. Does the plaintiff yet have a position
4 with respect to the documents they're requesting concerning
5 Brown Sugar?

6 MR. SLOTNICK: I do, Your Honor. ABKCO is closed
7 for the holidays starting I guess Monday. But I was able to
8 speak with ABKCO's --

9 THE COURT: You can remain seated --

10 MR. SLOTNICK: Thank you, Your Honor.

11 THE COURT: -- everybody's more comfortable.

12 MR. SLOTNICK: ABKCO's outside transactional lawyer
13 -- who actually apparently was in the room when at least one
14 of these documents was signed back in the '70s, before I
15 became a lawyer -- the reason the documents were not produced
16 initially, from what I understand, is that they confirmed the
17 ownership of the works in issue and therefore it's not a chain
18 of title document.

19 It is, yes -- and ABKCO still owns the rights. And
20 I believe that, you know -- but I haven't seen the entire
21 documents. I've been told about the documents. Obviously for
22 a variety of reasons, those documents have, you know, have
23 been and would be confidential.

24 We believe that at least part of one of the
25 documents, maybe both of the documents, have to do with

1 recording rights. And to the extent that the Court would
2 require us to produce anything, we would like to redact
3 anything that has to do with recording rights that have
4 nothing to do with music publishing. But from what I've been
5 told, that it is crystal clear that the rights to all of the
6 songs in issue, including Brown Sugar, you know, is set forth
7 in those documents.

8 THE COURT: Well, what I'm understanding you to say,
9 and maybe it's a misunderstanding, you're willing to produce
10 it -- you're willing to produce the documents redacting the
11 information regarding recording rights? Is that what I'm --
12 is that what you're saying?

13 MR. SLOTNICK: Yeah. We produced all of the chain
14 of title documents. This is merely confirming that the chain
15 of title remains unbroken.

16 THE COURT: All right. So --

17 MR. SLOTNICK: We would be willing to produce those.
18 I have yet to receive those documents, Your Honor. And, you
19 know, I think that we won't be able to receive anything until
20 after the holidays when ABKCO comes back to work.

21 THE COURT: All right. Can you do that by the
22 Monday -- well, hold on one second.

23 MR. SLOTNICK: The 9th?

24 THE COURT: The 9th?

25 MR. SLOTNICK: We can try. I mean if there's a

1 problem with that, we'll let --

2 THE COURT: Okay.

3 MR. SLOTNICK: -- you know.

4 THE COURT: All right.

5 MR. SLOTNICK: And we'll let defense counsel know as
6 well --

7 THE COURT: All right. Great. All right.

8 MR. ELKIN: Your Honor --

9 MR. SLOTNICK: Presumably, if the documents say what
10 we believe they say, then we would submit that there's no
11 reason to take Mr. Richards' deposition.

12 THE COURT: Well, until they serve a subpoena on
13 Mr. Richards, I'm not sure there's any issue. I mean you
14 don't -- do you represent Mr. Richards?

15 MR. SLOTNICK: No.

16 THE COURT: Yeah. Well, until they serve a
17 subpoena, I'm not sure there's any issue there.

18 All right. We're going to hear from defendants on
19 Peter Townsend.

20 MS. RANAHAN: Thank you, Your Honor. So we
21 understand Mr. Townsend is in fact a foreign resident.
22 Mr. Townsend became significant when we realized his --

23 THE COURT: What's the date -- I'm sorry to
24 interrupt you -- what's the date of the most recent
25 performance by The Who that's at -- you're talking about -- I

1 take it the performances are all performances of The Who, not
2 Townsend individually?

3 MS. RANAHAN: Right, they are --

4 THE COURT: Okay. And what's the most recent
5 performance by The Who that's in issue?

6 MS. RANAHAN: Do you happen to know that? I believe
7 that's not [inaudible] issue today?

8 MR. SLOTNICK: Well, I say '82. Something in -- The
9 Who in '82. Mr. Townsend in '93.

10 THE COURT: They've had several farewell tours.

11 MR. SLOTNICK: And will keep doing it.

12 MS. RANAHAN: So, Mr. Townsend, he became
13 significant once we realized how --

14 THE COURT: But let me come back to my question.

15 I'm trying to find out what the -- I'm trying to determine --

16 MS. RANAHAN: Okay.

17 THE COURT: -- what the most recent performance in
18 issue is. I looked through the chart. I saw some in the
19 '80s. I don't recall seeing anything --

20 MR. SLOTNICK: The Who shows were in the '80s --

21 THE COURT: I see '80 -- [inaudible] I'm looking.
22 I'm going backwards [inaudible] -- I see '82 --

23 MR. DICKSTEIN: I see some in 1995, Your Honor.

24 MR. SLOTNICK: There's a Pete Townsend -- there's a
25 Pete Townsend in 1993, I see.

1 THE COURT: All right. Now, you saw one from '95?

2 MR. DICKSTEIN: Yeah --

3 THE COURT: Okay.

4 MR. DICKSTEIN: -- in the exhibit to the complaint.

5 THE COURT: All right. So 20 years ago. Well, go
6 ahead.

7 MS. RANAHAN: Thank you. So with respect to
8 Mr. Townsend, while he is from another -- he is a foreign
9 resident, he has such a major stake in that there's 70 songs,
10 potentially up to \$10 million, that we proposed that as our
11 first two -- one of the first two options to plaintiffs to see
12 if perhaps we could get around the hang, if plaintiffs were,
13 you know, representing him or had a connection with him given
14 how huge his stake is, whether they agree to produce him.

15 In doing that, we also noticed that there's no
16 copyright registration for him at all, which basically
17 eliminates the possibility of seeking sanctions [inaudible].
18 So his stake of actual damages is significant, \$10 million.
19 If plaintiffs say he's not willing to come here without the
20 hangups, that's, you know -- then we'll move on.

21 There's another eight that we propose. And we've
22 basically gone back on one round as far as trying to agree to,
23 you know, one or two. And again at this point, Your Honor,
24 we're not seeking leave to take additional ones. So I don't
25 know that it's necessary for you to spend much time on this

1 issue. We're going to try to fit our depositions into the ten
2 that we're allowed for now, and we'll come back if we need any
3 further relief. But for this [inaudible] --

4 THE COURT: Let me come back to the question I was
5 asking before about Mr. Richards. Is there any affirmative
6 evidence that either your client or your clients' predecessor
7 in interest has that Peter Townsend did in fact confer the
8 rights on your predecessor that your predecessor says it had?

9 MS. RANAHAN: Again, Your Honor, [inaudible] --

10 THE COURT: I mean is there someone who says, yeah,
11 I remember on such and such a date, before such and such a
12 show, Peter Townsend said XYZ?

13 MS. RANAHAN: No, we don't know that, Your Honor.

14 THE COURT: I mean, what's the reason to believe
15 that this grant of rights then occurred? I mean --

16 MS. RANAHAN: Well, I think [inaudible] --

17 THE COURT: -- beyond the mere possibility which,
18 you know, anything is possible --

19 MS. RANAHAN: Right.

20 THE COURT: -- but what's the reason to believe that
21 this grant of rights occurred?

22 MR. ELKIN: It is based on the experience in other
23 cases, and granted on other songs and other artists. But just
24 the songs [inaudible] --

25 THE COURT: I mean, is there experience in other

1 cases regarding Pete Townsend?

2 MS. RANAHAN: No. But we presume here --

3 THE COURT: Let's assume even -- let's assume even
4 that artist X conferred the rights on your predecessor that
5 your predecessor claims, you know, artist X has no connection
6 with Pete Townsend. What's the reason to believe that Pete
7 Townsend did the same thing?

8 MS. RANAHAN: Well, just again, Your Honor, the way
9 that Bill Graham was very close to the artist who performed in
10 the show [inaudible]. Again, I'm not seeking any, at this
11 point, additional beyond the ten. So if plaintiffs don't want
12 to cooperate, at this point we just want the plaintiffs to
13 produce any -- I guess they don't have any registrations, but
14 they said they'd look into it.

15 So we really determined the two documents production
16 issues our first two options. And we provided the other
17 confidential list of the other eight, and then who [inaudible]
18 it, or you know --

19 THE COURT: Well, let me -- I mean, what relief are
20 you seeking with respect to Pete Townsend?

21 MS. RANAHAN: At this point, we're willing to just
22 try to work within the ten. We would just like that for the
23 two -- plaintiffs continue to meet and confer with us about
24 whether they can make available two including, you know, the
25 eight we've provided information for that might own the

1 publishing rights, which is consistent with your last order so
2 that if there are one or two more then we would like to take
3 plaintiffs', you know -- cooperate as far as providing us
4 their contact information and making them available.

5 THE COURT: Well, I'm still a little confused.
6 What, if anything -- let's assume that you convince me that
7 you should get whatever relief it is that you're seeking here
8 -- what does the order after today's conference say with
9 respect to Pete Townsend? What do you want me to do with
10 respect to Pete Townsend? Maybe you don't want me to do
11 anything with respect to him. I'm not sure what you're
12 seeking here.

13 MR. ELKIN: Your Honor, if I may? I --

14 THE COURT: Yeah.

15 MR. ELKIN: -- I apologize. I was going to try to
16 restrain myself. The circumstance is Ms. Ranahan has -- I
17 handled virtually all of the work with regard to the meeting
18 and conferring, and preparing the correspondence.

19 This does not go directly to your question, but I
20 would be remiss unless I mentioned it. Part of what we also
21 want to get out of the songwriters in the depositions is to
22 get them to admit and confront them with the fact that these
23 recordings that the plaintiffs claim constitutes a copyright
24 infringement has been openly and notoriously published for
25 many, many years, that they were aware of it, and they never

1 once complained.

2 We can argue about the legal effect of it, and that
3 doesn't go directly to the issue that Your Honor addressed in
4 terms of what happened, but I just would -- I didn't want
5 gloss over that point. That has legal significance for us in
6 terms of what we want to argue, but it doesn't go directly to
7 the issue that you addressed to us.

8 THE COURT: Okay. Well, let me come back to the
9 issue that I addressed. I'm just not sure what it is you're
10 seeking with respect to Pete Townsend. I mean with respect to
11 Keith Richards, it's been reduced to a document request at
12 this point. I understand that. I'm not sure what you want me
13 to do with respect to Pete Townsend, if you want me to do
14 anything?

15 MS. RANAHAN: Right. No, Your Honor. I think what
16 we're trying to do here is just let you know that we are
17 underway and attempting to come up with the two. Plaintiffs
18 have rejected, you know, every one of them. We're still
19 trying.

20 If Pete Townsend isn't one of the two, he's not one
21 of the two, I mean we've now come to this other issue with
22 Pete Townsend, which is there's no registration. So if it's
23 not Pete Townsend it's not Pete Townsend. We would just like
24 to get to continue our efforts to meet and confer in coming up
25 with, you know --

1 THE COURT: Okay.

2 MS. RANAHAN: -- [inaudible] more. But it's not --
3 and we don't need you to order anything --

4 THE COURT: Okay.

5 MS. RANAHAN: -- because we're not seeking the extra
6 depositions, which was the whole original premise upon which
7 we came [inaudible] --

8 THE COURT: Right. All right. So what I'm
9 understanding you to say -- and again I'm not trying to put
10 words in anybody's mouth, and please correct me if I'm wrong
11 -- what I'm understanding you to say, is you're not seeking
12 any relief right now with respect to the depositions of the
13 recording artists that were the subject of our conference
14 about two weeks ago; am I correct?

15 MS. RANAHAN: Yes.

16 THE COURT: Okay. So I don't think there's anything
17 for you to respond to right now then on that.

18 MR. SLOTNICK: Your Honor, the only thing I would
19 respond to has to do with the registrations. And first of
20 all, I apologize. I thought registrations had been produced.
21 When Ms. Ranahan mentioned that there were none --

22 THE COURT: These were for Pete of The Who --

23 MR. SLOTNICK: Pete Townsend.

24 THE COURT: Yeah.

25 MR. SLOTNICK: You know, we looked through the file

1 and she's correct. They were not produced. It doesn't mean
2 that there are none. What we were able to do yesterday, just
3 by going through the copyright office online search is we've
4 identified -- I think there's about 70 pages worth of
5 registrations. We are ordering the registrations.

6 So as soon as we have those, which should be
7 sometime in the middle of next month, we will produce those as
8 well. I can proffer a copy of this which doesn't just limit
9 it to the Pete Townsend songs in issue, but these were
10 publically available. It's not all of them. It is the vast
11 majority of them.

12 The copyright office maintains an online registry,
13 if you will, only going back as far as 1978. So anything that
14 would have been registered before that, which would have been
15 a certain number of The Who, Pete Townsend compositions, might
16 not find its way on here. But I believe that there's over 50
17 of the 70 contained in this, and, you know, I'll provide this
18 to Ms. Ranahan and Mr. Elkin --

19 THE COURT: Okay.

20 MR. SLOTNICK: -- at the end of the -- at the end of
21 the conference.

22 THE COURT: Okay. All right. All right. I think
23 that takes us then to Roman numeral II on Page 2 of
24 Mr. Slotnick's letter which are the documents concerning the
25 Graham-Sult Clainos -- Graham-Sult v. Clainos. I read the

1 letter from Ms. Ranahan just a few moments ago.

2 Did I understand your letter to say that you
3 reviewed all the documents from that litigation?

4 MS. RANAHAN: I was very involved in that litigation
5 as far as defending. I was there for almost every deposition
6 and if I wasn't there, I read the transcript in connection
7 with summary judgment. So, I'm very --

8 THE COURT: But that was some years ago?

9 MS. RANAHAN: No, it's ongoing. We just recently
10 won summary judgment. It went on from 2009 until the present.
11 And we just within the last year -- it's now up on the Ninth
12 Circuit Court appeal. Just a few months ago, we won a fees
13 award, we won summary judgment, and it's here. So I'm very
14 familiar with the case. I can tell you anything about it that
15 you ask me, but it has nothing to do with recording.

16 THE COURT: Well, I mean, the statement that your
17 adversary cite in the Claimos declaration seems to be relevant
18 to this litigation.

19 "While Graham was alive, BGE did not generally
20 financially exploit the archives primarily due to
21 concerns regarding artists' rights, e.g., if a
22 concert was recorded, a question arises whether the
23 companies can exploit that recording financially
24 without the artists' consent."

25 MS. RANAHAN: Right.

1 THE COURT: "The companies financially exploited the
2 archives only with the artists' consent on a limited basis."

3 MS. RANAHAN: So, that --

4 THE COURT: That seems to support --

5 MS. RANAHAN: Well, this, as a question arises, if
6 it can be without their consent. It's not talking about any
7 recording. [Inaudible] --

8 THE COURT: No, it's not dispositive. But I think
9 it --

10 MS. RANAHAN: [Inaudible] --

11 THE COURT: -- weighs more in their favor than your
12 favor.

13 MS. RANAHAN: Okay. I mean, I'm just telling you
14 that the -- there's nothing to do with the recording.
15 Plaintiffs' claims have nothing to do with recording. It's
16 about certain items in the archives and it's a trademark.
17 It's poster copyrights. It's --

18 THE COURT: No, I understand all that, but if --

19 MS. RANAHAN: Right.

20 THE COURT: -- in the course of that -- I understand
21 what you're saying that the thrust of that litigation didn't
22 deal with the issues that are front and center in this
23 litigation. I understand --

24 MS. RANAHAN: Right [inaudible] --

25 THE COURT: -- I understand that. But nevertheless,

1 even if the issues in the case were different, if somebody
2 with firsthand knowledge or claiming firsthand knowledge makes
3 a statement concerning a transfer or the transfer or
4 non-transfer, the issue of whether or not the Bill Graham
5 archive had the rights, isn't that relevant here?

6 MS. RANAHAN: Well for this statement, absolutely.

7 They can use that --

8 THE COURT: Yeah.

9 MS. RANAHAN: -- statement from the declaration.
10 They're taking Mr. Clainos's deposition. They've already
11 noticed --

12 THE COURT: Yeah.

13 MS. RANAHAN: -- his deposition. What they're
14 asking for though is for every underlying deposition
15 transcript, everything that has to do with that case. And
16 that case was not going to these issues at all is what
17 [inaudible] -- Mr. Clainos --

18 THE COURT: Are they subject to a -- are the
19 documents -- are the materials subject to a protective order?

20 MS. RANAHAN: Yes.

21 THE COURT: Everything is subject to a protective
22 order?

23 MS. RANAHAN: Yes. Every deposition is.

24 THE COURT: How many depositions were there in that
25 case?

1 MS. RANAHAN: Over ten. I want to say there were
2 maybe 15.

3 THE COURT: I mean not counting --

4 MS. RANAHAN: I can literally tell you what every
5 one of them said though, and it wasn't about recording. This
6 was a -- I mean, this was a public declaration that they had,
7 and I didn't ask about. But look at the -- if you look at the
8 bulk of this declaration, it's very lengthy and --

9 THE COURT: Yeah.

10 MS. RANAHAN: -- and every other pleading -- they
11 can look at years of dockets for this case, and see the
12 recordings were just not at issue. There's no -- nothing to
13 do with recordings. Their archives did contain the
14 recordings, but that's not what this case is about.

15 THE COURT: No, I understand that. But --

16 MS. RANAHAN: And there's not --

17 THE COURT: -- even if that's not what the case is
18 about, if somebody --

19 MS. RANAHAN: Right.

20 THE COURT: -- with firsthand knowledge makes a
21 statement that's relevant, it really doesn't --

22 MS. RANAHAN: Right.

23 THE COURT: -- you know, that gives -- by definition
24 -- that gives the statement of relevance.

25 MS. RANAHAN: Well, I'm not saying that they can't

1 Mr. Clainos anything. I mean Mr. Clainos -- they're taking
2 his deposition, Your Honor. They've already issued a subpoena
3 to him. And so I'm telling you any one in that case with
4 relevant knowledge about the recording, is Mr. Clainos. And
5 they're taking him. His underlying declaration -- or
6 deposition transcript in this case, which I believe lasted two
7 days, with nothing to do with recordings.

8 Once again, it was about personal items in the
9 archives, how he decided he was a fiduciary to both plaintiffs
10 and he also was running the company. So he had a dual hat.
11 And the question was whether certain personal items including
12 a personal scrapbook [inaudible] in one way or the other, and
13 whether he concealed poster copyrights for plaintiffs. The
14 plaintiffs in that case were not seeking anything regarding
15 the recordings. And Mr. Clainos doesn't know any testimony
16 about the recordings.

17 THE COURT: Well, except at least Paragraph 20 of
18 the declaration.

19 MS. RANAHAN: [Inaudible]. And I think that was
20 just an example. I mean an e.g. to show when they would want
21 artists [inaudible]. I mean, this quote -- actually the fact
22 that a question arises an artists' consent would be necessary
23 is exactly why we want the artists' deposition. Again, this
24 is not speaking specifically to any recording without that
25 consent.

1 THE COURT: Well --

2 MS. RANAHAN: -- I mean, there was question that
3 arises.

4 THE COURT: Well no, I mean -- well, what the
5 statement means is going to be for the fact finder. So I'm
6 not going to -- we're not going to get into a debate of what
7 this means but -- why don't I hear what -- share plaintiffs'
8 thoughts on this.

9 MR. SLOTNICK: Sure, Your Honor. And Ms. Ranahan
10 may be right that the primary thrust of that litigation was
11 about posters and maybe other non-recording assets. But it's
12 clear as Your Honor pointed out, there were statements made in
13 that litigation. It may not have been in Paragraph 1 or
14 Paragraph 2 of the declaration. But there are statements that
15 were made that clearly relate to the way the recordings were
16 made, what rights there were granted, if any, with respect to
17 them.

18 And, you know, I understand why defense counsel
19 wants to minimize the importance of it. To us, this came as
20 quite a surprise, not the least of which is because
21 Mr. Clainos was not identified in interrogatory responses that
22 defendants served, nor were any other individuals associated
23 with the Bill Graham companies or any of the other people that
24 they claim to have done due diligence from with respect to any
25 of the archives that they acquired over the years, some of

1 which were acquired as recently as 2011 and 2012.

2 So this concerns us on a number of levels. One is
3 the identification as I mentioned of witnesses, individuals,
4 who may have knowledge of the circumstances of these
5 recordings. Two are production of any statements they may
6 have made, this declaration being a prime example of them.

7 THE COURT: Have you looked at the docket sheet in
8 the Clainos' litigation?

9 MR. SLOTNICK: We have, Your Honor, and it -- it is
10 lengthy; right? So, I haven't read every --

11 THE COURT: Yeah.

12 MR. SLOTNICK: -- entry. But --

13 THE COURT: Are the documents filed in connection
14 with the motions, the affidavits and such, are they under
15 seal?

16 MR. SLOTNICK: I don't know if there are any that we
17 tried to click on that we could not open. I'm not certain of
18 that. But clearly, Your Honor, to the extent those documents
19 are publically available from the Court's website, you know,
20 we're not asking defendants to produce them. Our concern is
21 that there may be other statements. I just heard that there
22 were ten or 15 depositions taken.

23 THE COURT: Ten depositions.

24 MR. SLOTNICK: Maybe I'm wrong. I thought she said
25 it could be as many as 15.

1 MS. RANAHAN: At least ten --

2 THE COURT: At least ten?

3 MS. RANAHAN: -- [inaudible] maybe 15.

4 THE COURT: All right. Ten to 15.

5 Okay. Go ahead.

6 MR. SLOTNICK: So our concern is we certainly
7 haven't seen that number of deposition transcripts. And I
8 don't think counsel can make a representation that there were
9 -- sitting here that there were no statements regarding the
10 recordings of these concerts.

11 I mean that litigation -- while I don't have
12 familiarity with it as Ms. Ranahan does -- it clearly involved
13 the circumstances of the Bill Graham companies, how they were
14 operated. And, you know, one of the primary businesses was
15 putting on concerts. And apparently these concerts were being
16 recorded as well.

17 So, you know, we would ask that any statements
18 related in any way to recordings of the concerts from that
19 litigation that are not publically available on the Court's
20 website be produced. You know, we have a protective order
21 here that we can -- that should be able to address any
22 concerns Ms. Ranahan has. And --

23 THE COURT: Let me ask Ms. Ranahan a question.

24 Of the ten to 15 depositions, how many were
25 designated confidential by your clients?

1 MS. RANAHAN: I don't know that, Your Honor.

2 THE COURT: Well, I mean, with respect to the ones
3 that are designated confidential by your clients, I'm not sure
4 what the obstacle is to production?

5 MS. RANAHAN: Well, they don't -- I mean, what is
6 the relevance, or the don't mention -- you know, they all
7 mention recordings. And I'm happy to go through --

8 THE COURT: Well --

9 MS. RANAHAN: -- the transcript and search for the
10 recording, and if they discuss them. But this case is a
11 probate case, Your Honor. This is a --

12 THE COURT: No, I understand that. We've talked
13 about that --

14 MS. RANAHAN: Yes.

15 THE COURT: -- several times. And the fact -- you
16 know, I'll say it again -- that the fact that the main thrust
17 of the Graham-Sult litigation was something other than the
18 issues here, doesn't necessarily mean that the statements are
19 irrelevant. Paragraph 20 is proof of that.

20 MS. RANAHAN: Well, I think the [inaudible] --

21 THE COURT: But let me --

22 MS. RANAHAN: Oh, I'm sorry --

23 THE COURT: -- do we know who the -- maybe one way
24 to slice into this is, who was deposed?

25 MS. RANAHAN: Right. So there are [inaudible] --

1 THE COURT: Do we know who the names of the
2 witnesses --

3 MS. RANAHAN: Yes.

4 THE COURT: -- and what their roles and the history
5 of --

6 MS. RANAHAN: Yes.

7 THE COURT: -- Bill Graham's work was?

8 MS. RANAHAN: So there's [inaudible] and Peaches
9 O'Reilly.

10 THE COURT: Peaches O'Reilly?

11 MS. RANAHAN: She was hired by Bill Graham to make
12 scrapbooks; that was her role. There's the son. There's
13 plaintiffs, Alex and David Graham, who were the plaintiffs who
14 are seeking the certain assets, and had no involvement in the
15 creation of any recordings, and obviously no testimony to
16 provide.

17 THE COURT: So they were not present backstage at
18 the concert venues in issue?

19 MS. RANAHAN: I don't believe so, Your Honor. One
20 of them was very young at the time. He was ten. He may have,
21 you know, perhaps, but he didn't talk about that. He didn't
22 talk about [inaudible].

23 THE COURT: All right.

24 MS. RANAHAN: So that was the two plaintiffs.
25 Mr. Clainos was deposed.

1 THE COURT: And they're deposing Mr. Clainos?

2 MS. RANAHAN: Yes.

3 THE COURT: Okay. Go ahead.

4 MS. RANAHAN: There was the person who was
5 responsible for creating the copyright registrations, a lot of
6 them for the posters; not for the recordings but the posters.
7 And I'm just blanking out [inaudible].

8 [Pause in proceedings.]

9 MS. RANAHAN: You had two days, you had two short
10 days.

11 THE COURT: All right. So this individual made the
12 copyright registrations and the posters --

13 MS. RANAHAN: Yes, he made the copyright
14 registrations. There was Mr. Clainos's -- I'm sorry, Alex
15 Graham's mother.

16 Was she deposed?

17 She may have been deposed. She was on the list.

18 | She may have been cut [inaudible]. There was Bill Sagan.

19 | There were [inaudible] --

20 THE COURT: And Sagan was designated confidential by
21 you?

22 MS. RANAHAH: Yes.

23 THE COURT: Okay. I mean by your side, not you
24 personally. Go ahead.

25 MS. RANAHAN: He had, I believe, a 30(b)(6)

1 deposition and a regular deposition.

2 THE COURT: All right. Who else?

3 MS. RANAHAN: There are other -- there were
4 Katherine York, who was a woman who was the lead archivist;
5 meaning, she sorted the posters, she wrote descriptions for
6 the posters and the --

7 THE COURT: So, she was the archivist of printed
8 material?

9 MS. RANAHAN: Yes.

10 THE COURT: Go ahead.

11 MS. RANAHAN: Right. She actually started working
12 -- so she worked for BG after Bill Graham died. And then she
13 began working for Wolfgang's Vault for a while, then no longer
14 worked there, the attorney.

15 Mr. Greene. Yeah, Mr. Greene was formerly a
16 defendant in that action; he was being sued originally
17 [inaudible]. Richard Greene. He was being sued essentially
18 on a suit on a malpractice theory that plaintiff rejected on
19 the [inaudible] stage. But he provided -- after he was
20 dismissed, he actually was -- he sat for deposition about
21 whether his advice on trademarks was --

22 THE COURT: He was sued for malpractice in
23 connection with trademark work?

24 MS. RANAHAN: Essentially, yes.

25 THE COURT: Okay.

1 MS. RANAHAN: Because what -- one of the major
2 things that -- this didn't affect our clients, but it affected
3 Mr. Clainos. That was one of the claims they brought --
4 Mr. Clainos was a defendant in the case.

5 THE COURT: Yes.

6 MS. RANAHAN: So one of the claims they brought
7 against Mr. Clainos was concealing and misappropriating the
8 trademark, concealing it from plaintiffs; the trademarks for
9 the Filmore.

10 MR. SLOTNICK: I'm sorry. To the what?

11 THE COURT: Filmore --

12 MR. ELKIN: Filmore --

13 MR. SLOTNICK: Filmore?

14 THE COURT: The Filmore trademark.

15 MS. RANAHAN: The Filmore trademark.

16 MR. SLOTNICK: Got it.

17 THE COURT: Who else?

18 MS. RANAHAN: Greg Orloff, someone named Greg
19 Orloff, and he was someone who worked on the archives. And he
20 had -- [inaudible] but I think there's someone -- it starts
21 with an O. I may be saying his last name wrong

22 THE COURT: All right.

23 MS. RANAHAN: But I'm thinking of the person who, he
24 worked also on the archives.

25 THE COURT: All right.

[Pause in proceedings.]

THE COURT: Look, is the only objection here --

MS. RANAHAH: Relevance.

THE COURT: -- relevance and the protective order?

I mean, if you're --

MS. RANAHAH: No, there's --

7 THE COURT: -- if what you're saying is true, if
8 they're irrelevant -- you know, look, I appreciate Rule 26
9 limits discovery to relevant evidence, but there's at least
10 one statement here by Mr. Clainos in his declaration that's
11 relevant. If they want to --

12 MS. RANAHAN: [Inaudible] --

16 MS. RANAHAN: We can look through Mr. Clainos's
17 transcript to see if recordings were discussed, and then if
18 so [inaudible] --

19 THE COURT: Well, is there any doubt -- I mean apart
20 from the protective order with respect to materials that were
21 designated confidential by --

22 MS. RANAHAH: Right.

23 THE COURT: -- parties other than your clients, are
24 you prejudiced by production of the deposition transcripts?

25 MS. RANAHAN: No, it's just a burden -- it's a

1 burdensome, Your Honor. It's not proportional to the needs of
2 the case. I mean, every [inaudible] --

3 THE COURT: Aren't these in electronic form?

4 MS. RANAHAN: Yes, they're in electronic form.

5 THE COURT: So isn't --

6 MS. RANAHAN: Well, we would have to reach out to
7 everyone that [inaudible] --

8 THE COURT: Well, no. I think if I grant
9 plaintiffs' application, I think that burden falls on them.
10 I think all you'd have to do is identify the party or firm
11 that's designated them as confidential, and then they can
12 negotiate with the designator as to whether or not the can get
13 them. Because that's not your fight, that's the designating
14 parties' fight.

15 MS. RANAHAN: Well, we can [inaudible] --

16 THE COURT: But I mean in terms of burden, isn't it
17 just a matter of attaching them to an email and transmitting
18 them to your adversary?

19 MS. RANAHAN: Well, no. You have to review
20 [inaudible].

21 THE COURT: Review them for what?

22 MS. RANAHAN: Well, to see if there's a privilege or
23 anything that we need to redact.

24 THE COURT: It's a deposition.

25 MS. RANAHAN: Correct.

1 THE COURT: What could be privileged in a
2 deposition?

3 MS. RANAHAN: Well, I'm sorry. I'm not talking
4 [inaudible]. I mean, we would have to review --

5 THE COURT: No, no. Let me back up. Maybe I'm not
6 communicating effectively. With respect to material that's
7 designated confidential by you, there's a protective order in
8 place here; correct?

9 MS. RANAHAN: Yes.

10 THE COURT: So if you designated it confidential
11 here, I don't see what the impediment is to producing
12 depositions from the Claimos' action that were designated as
13 confidential by your parties.

14 MS. RANAHAN: Okay.

15 THE COURT: Okay. With respect to material that's
16 designated confidential by someone other than your client, I
17 think all you'd have to do is identify the witness and
18 identify who designated it as confidential, and let
19 Mr. Slotnick take up the issue at that point.

20 MS. RANAHAN: Okay.

21 THE COURT: Okay.

22 MS. RANAHAN: Okay.

23 THE COURT: But I mean in terms of the burden, I'm
24 not sure what there is -- what there is to review.

25 MR. ELKIN: Your Honor, let me see if I could be

1 helpful here.

2 THE COURT: Go ahead.

3 MR. ELKIN: What if we -- subject to whatever court
4 rules require, in terms of addressing the issue of
5 confidentiality -- we produce the Claimos' testimony. That is
6 the one witness whose testimony at least in the declaration
7 form, they think is relevant. And the Court seems to think
8 [inaudible] of what's important here.

9 And if they see something in that deposition that
10 gives them the reason to need to examine other transcripts,
11 then they can come back to the Court with regard to that.
12 There doesn't seem to be based on the proffer that Ms. Ranahan
13 has made, and given the fact that they've identified this only
14 witness in the case, that would seem to be more of a
15 proportionate outcome.

16 MR. SLOTNICK: Your Honor --

17 THE COURT: I'm just not sure how proportionality
18 figures into this, given the fact that we're talking about a
19 couple of keystrokes.

20 MR. ELKIN: Well, it's --

21 THE COURT: In the world of electronic media,
22 production of deposition transcripts is not the same issue
23 that it was 35 years ago.

24 MR. ELKIN: There's no question that it's a few
25 keystrokes. But I don't know that simply -- if that's the,

1 you know, the acid test, then of course many issues with
2 regard to the need to produce wouldn't even be an issue. We
3 had discussions two weeks ago in this courtroom with regard to
4 whether something was burdensome or not. We didn't really
5 pass through the electronic transfer prism of those particular
6 requests.

7 And I think it can't be just a sheer fishing
8 expedition. You know, if Your Honor orders it, of course
9 we'll comply with it. But they haven't made any showing at
10 all other than potentially -- a statement of Mr. Clainos's
11 declaration to go beyond that. And sure, I guess you could
12 take up the issue of depositions in every single case in
13 which, you know, [inaudible] archives appears as a party. And
14 that could be the test as well. I just think it's too far
15 abridge.

16 MR. SLOTNICK: Your Honor, if I may?

17 THE COURT: Go ahead.

18 MR. SLOTNICK: I mean, what Mr. Elkin is suggesting
19 is a false equivalent here. Frankly, Ms. Ranahan's proffer
20 now comes several months late after not designating, or
21 producing, or identifying Mr. Clainos.

22 So if, you know, if somebody is going to get the
23 work product wrong for the plaintiffs' case, I just assume it
24 was us. I'm not going to take their word for any of this. If
25 they want to take our word that all of the copyrights in this

1 case are owned by the plaintiffs, you know, then maybe we can
2 talk about, you know, about equivalence but they're not going
3 to trust us after we produced thousands of documents
4 identifying the chain of title of these works.

5 And now we have a witness who was unidentified by
6 the defendants, who clearly had something to say about this in
7 this other case, and now they don't want us to look at those
8 depositions. You know, it's either going to be a waste of our
9 time or they're hiding something. And I'm prepared to waste
10 Mr. Dickstein's time.

11 MR. ELKIN: That is completely [inaudible].

12 THE COURT: I'm sorry. Go ahead.

13 MR. ELKIN: First of all, nobody hid anything.
14 Those witnesses did not testify with regard to the issues in
15 this case about which the matters that are responsive at all.

16 THE COURT: No, well let me say something,
17 Mr. Elkin, just so we're all on the same page. I mean, my --
18 although I think the statement in Paragraph 20 of
19 Mr. Clainos's declaration that's annexed as Exhibit B to
20 plaintiffs' letter, although the statements in that paragraph
21 I think are relevant, you know, I quite understand why he
22 would not have been identified or not have been produced.

23 This is such a -- it sounds like to me like it's
24 sort of a needle in the haystack of the Clainos' litigation.
25 So I can understand probably why it was overlooked. And I'm

1 willing to assume at this point that it was overlooked because
2 it is sort of the needle in the haystack of the litigation.
3 But, you know, someone ferreted it out. And we now know that
4 this statement was made and the statement is relevant to this
5 litigation.

6 I'm not suggesting any bad faith. Again, it's sort
7 of a needle in the haystack. But they found the needle, and
8 if they want to look to see if there are some other needles in
9 the haystack, and, you know, it's a couple of keystrokes on
10 your side I'm not sure why the deposition transcript should
11 not be produced.

12 MR. ELKIN: Your Honor, I'm not here -- I don't want
13 to belabor it. I think you heard the essential arguments. I
14 would ask Ms. Ranahan if she has anything else of substance to
15 articulate. I --

16 THE COURT: All right.

17 MR. ELKIN: We did look through that case. And it
18 is difficult for us to stand or sit before you and have any
19 thought that somehow the issues and testimony that was adduced
20 in that case bear any relationship here. It doesn't mean that
21 [inaudible] some examination. I would [inaudible] for it to
22 be --

23 THE COURT: One second, one second.

24 MR. ELKIN: [Inaudible] --

25 THE COURT: Bruce, do you know what's going on with

1 the sound effects here?

2 MR. ELKIN: I'm not next to -- I'm too far away.

3 THE CLERK: This happened before you were here. We
4 can't blame the attorneys.

5 MR. ELKIN: All right.

6 THE COURT: Maybe it's the ghost of Bill Graham, who
7 knows.

8 Go ahead.

9 MS. RANAHAN: No, Your Honor. I mean, I understand
10 and this does relate. I know you want to table the
11 reconsideration. But we really were seeking four and an
12 agreement. And that's obviously in consideration of these
13 four agreements that do bear some relevance. And so to the
14 extent is that you're suggesting this is [inaudible] --

15 THE COURT: Well, the reconsideration, I really --
16 you know, I just got your -- I didn't see your letter this
17 morning. I just saw it when you handed it up before the
18 conference. And I don't think Mr. Skolnick has had a --
19 Mr. Slotnick, I apologize -- has had a chance to respond,
20 so --

21 MS. RANAHAN: I understand.

22 THE COURT: -- that's why I want to defer
23 consideration on that.

24 MS. RANAHAN: I understand, Your Honor. I would
25 just hope that the same principle --

1 THE COURT: But --

2 MS. RANAHAN: -- will be applied throughout
3 [inaudible] --

4 THE COURT: -- all right.

5 MS. RANAHAN: And that's all I have [inaudible] --

6 THE COURT: All right.

7 MS. RANAHAN: And, you're right. I mean I just
8 don't -- because again I lived through it. I've been dealing
9 with that case since 2009. The first time Mr. Dickstein and I
10 discussed this was Saturday. You know, I laid out for him
11 everything that happened in this case. He said okay, that's
12 your representation. You know, I'll take that.

13 So I didn't even expect this to be in the letter
14 that we got last night. We had already said that Mr. Clainos
15 would absolutely do that. I mean, to the extent we're not
16 violating any confidentiality Mr. Clainos's counsel, we would
17 produce Mr. Clainos's [inaudible].

18 I think that the rest of them, if they want to go on
19 that fishing expedition, and you're going to allow it, then
20 we'll, you know, comply. But we don't think that anyone's
21 time, Mr. Slotnick thinks it's worth to defend [inaudible], so
22 [inaudible].

23 THE COURT: All right. Let me go off the record for
24 one second.

25 Bruce, can you just stop the recording and go back

1 90 seconds and just make sure we're getting a recording here.

2 [Pause in proceedings.]

3 THE COURT: Okay. We're recording again?

4 THE CLERK: Yes.

5 THE COURT: Okay. Do you want to say -- did you
6 want to say anything --

7 MR. ELKIN: We --

8 THE COURT: -- else on the depositions --

9 MR. ELKIN: Yes. Your Honor, we understand you're
10 going to reserve judgment with regard to the motion for
11 reconsideration. We respect that. Thank you for that. You
12 know, the circumstances, I think we've made our arguments with
13 regard to the Clainos' transcripts. And if it's Your Honor's
14 order to have us produce them, then we'll produce them.

15 THE COURT: All right. Look, with respect to the
16 deposition transcripts in the Graham-Sult litigation, I'm
17 going to direct that defendants produce the deposition
18 transcripts that were designated confidential by the
19 defendants here -- by the defendants in this action. With
20 respect to the remaining deposition transcripts, I'm going to
21 direct that defendants identify the witnesses and the identity
22 of the attorneys who designated them confidential.

23 All right. And plaintiffs' counsel here can decide
24 whether they want to seek relief from the parties who
25 designated them confidential. Okay?

1 MR. SLOTNICK: Thanks, Your Honor. Could I ask for
2 a clarification? Would that also apply to any affidavits or
3 declarations that were --

4 THE COURT: Well, I think you told me before that
5 there were none that you couldn't click on. There were none
6 that you couldn't open. So --

7 MR. SLOTNICK: There may have been some produced or
8 some written statements produced that didn't make their way
9 onto the docket.

10 MR. ELKIN: So, is it -- Your Honor, let me suggest
11 that --

12 THE COURT: Well, hold --

13 MR. SLOTNICK: And I'm willing to limit that to
14 anything that was related at all to the recordings. We're not
15 looking for information about post --

16 THE COURT: Well, I think, you know, you've got the
17 net as it's being cast now is a pretty broad net. I mean, if
18 it's not a statement on the record --

19 MR. SLOTNICK: Okay.

20 THE COURT: You know, number one, I'm not sure if
21 there's anything else out there that exists besides attorneys
22 notes, which you couldn't get anyway. You know, I think as it
23 is now, it's a fairly broad net. And as I said before, I
24 think that -- you know, look, the thing you -- the paragraph
25 you found in the Claimos' deposition is relevant, but it

1 really is sort of a needle in the haystack, and it's certainly
2 not a dispositive needle. It weighs in your favor, but it's
3 not a smoking gun for either side.

4 MR. SLOTNICK: We'll limit our requests to the
5 depositions and go from there.

6 THE COURT: All right. All right. The next issue
7 is Roman III on Page 3 of plaintiffs' letter.

8 MR. SLOTNICK: And, Your Honor, and I think this
9 sort of dovetails with the issues that we've been discussing.
10 You know, as Your Honor may recall at the last conference,
11 when Your Honor asked what's the basis for defendant's belief
12 that any rights were granted, there were representations made,
13 well, this is based on Bill Graham's entourage, staff and
14 employees.

15 Now, there may be some overlap or a great deal of
16 overlap between those people and the people that we've just
17 heard were deposed in the Clainos' litigation. But I'm not
18 certain of that. None of those people have been identified to
19 us. So, we would like that to happen. And relatedly -- I'm
20 just skipping ahead a bit --

21 THE COURT: Go ahead.

22 MR. SLOTNICK: -- defendants have, you know, made
23 representations that there are no longer any due diligence
24 materials related from their acquisitions. I mean, these were
25 by defendants' own account tens of millions of dollars of

1 archives they were acquiring; some of which were acquired as
2 recently as 2011 and 2012.

3 You know, I have a hard time believing that there's
4 no documents from that that exist. But if that's defendants'
5 representation, then I guess we'll have to deal with that in
6 another way.

7 THE COURT: Well, I mean, if there are no due
8 diligence documents, doesn't that help you?

9 MR. SLOTNICK: Unless the due diligence showed up
10 something that defendants didn't like, and they went ahead
11 anyway.

12 THE COURT: What are defendants' thoughts?

13 MS. RANAHAN: Your Honor, about the -- well, as far
14 as the due diligence, what the due diligence was, was they
15 spent weeks, and weeks, and weeks looking through the
16 archives, and cataloging information. But there wasn't any,
17 you know, memos or any issues like that that would have any --
18 there just aren't any.

19 There weren't any that exists now. There could have
20 been maybe in 2002, but I know -- because this issue's come up
21 in more than one case -- and there just aren't any more files.
22 There could be files in different attorneys [sic], but we've
23 checked for those attorneys too, and we haven't been able to
24 uncover them. So, there's no due diligence files to produce.

25 That doesn't mean that Mr. Sagan didn't do --

1 THE COURT: Hold on a second --

2 MS. RANAHAN: -- extensive [inaudible] --

3 THE COURT: -- hold on a second, though. But is the
4 material that was reviewed in performing the due diligence,
5 has that been produced?

6 MS. RANAHAN: Yes. As far as the agreements, the
7 underlying -- I'm sorry, what are you --

8 THE COURT: If --

9 MS. RANAHAN: -- if there is anything left, we've
10 produced it. But to the extent there's no longer -- our
11 client's moved several times, and he doesn't keep everything
12 for decades. So, some of this happened 15 years ago, and he
13 hasn't kept every piece of paper that he looked at during that
14 time. He looked through the archives, which is --

15 THE COURT: But whatever was reviewed in the course
16 of performing the due diligence investigation, that's been
17 produced?

18 MS. RANAHAN: Well, that's millions of items in the
19 archives, Your Honor. Part of the diligence was going through
20 every item in the archive and cataloging, and so -- there is
21 no way to produce millions of archived items. I mean, this is
22 -- I'm talking now about the physical items. So, that was
23 what the due diligence involved, was looking through --

24 THE COURT: Well, let me try to come at it a
25 different way, a little more focused way then. Has all the

1 material that was reviewed during the due diligence search
2 concerning the transfer of the rights in issue, has all that
3 material, to the extent it exists, been produced?

4 MS. RANAHAN: Yes.

5 THE COURT: All right. And with respect to the
6 identification of concert staff and employees, I think the
7 term that was used at the last conferences was the entourage,
8 have they been identified?

9 MS. RANAHAN: So, our client is not in a position to
10 identify who Bill Graham's entire entourage was. I mean,
11 we've --

12 THE COURT: No, it's not a question of who his
13 entire entourage was. We're not talking about who made his
14 sandwiches and coffee. But to the extent that there were
15 individuals who were going to support this -- the contention
16 that Bill Graham was close to the artists, and Bill Graham got
17 these rights before the concerts, the individuals who are
18 going to testify to that version of events, have they been
19 identified?

20 MS. RANAHAN: To the extent, yes, we're planning to
21 rely on any individual that have been disclosed -- or know of
22 any individual who, you know, would provide that testimony,
23 and they've been disclosed. There's no one that we're not
24 disclosing. So, I'm not exactly sure what plaintiffs are --

25 THE COURT: All right. I mean, you realize if you

1 don't disclose somebody, you can't call --

2 MS. RANAHAN: Of course, yes.

3 MR. DICKSTEIN: Judge, I would just make an
4 observation --

5 THE COURT: Go ahead.

6 MR. DICKSTEIN: -- it's not just the 26(a)
7 disclosures, which I agree are limited to people they intend
8 to rely on. But we also served interrogatories seeking
9 identity of anyone who had knowledge of the performance, or
10 reproduction, or acquisition of these recordings.

11 So, even if defendants don't plan to rely on them,
12 those could be people we want to, you know, depose or talk to.
13 So, I would ask that -- I don't think any of those people have
14 been identified in response to our interrogatories.

15 THE COURT: Well, fair enough. I mean, is there
16 anyone else who has -- that you're aware of -- who has
17 knowledge or you have reason to believe would have knowledge
18 concerning the transfer of rights that's at issue here,
19 whether it helps you or hurts you?

20 MS. RANAHAN: No, Your Honor.

21 THE COURT: Is there any -- with respect to the due
22 diligence -- is there anything that defendant is looking for
23 -- I'm sorry, plaintiff is looking for? Is there something in
24 particular you think hasn't been produced?

25 MR. DICKSTEIN: Well, there were -- and defense

1 counsel's right, that the actual transfer agreements -- the
2 final asset transfer agreements have been produced. And
3 there's been no other materials related to those transfers
4 produced, as far as I'm aware based on my review. Those
5 agreements -- a couple of them do reference -- one references
6 a disclosure letter, that's the Bill Graham transfer
7 agreement.

8 There was another agreement that references an
9 earlier agreement in the same chain of ownership for these
10 recordings. In some cases, defendants didn't acquire the
11 recordings directly from the people who made them. They were
12 purchased by other investors or other people. And I can
13 probably get the reference.

14 MS. RANAHAN: Your Honor, we've produced every
15 transfer document we have from any transaction. So, there's
16 nothing that we're withholding in that regard.

17 THE COURT: Are there specific documents that you
18 want, Mr. Dickstein, that you've spoken about with defendants'
19 counsel?

20 MR. DICKSTEIN: I'm over on the --

21 THE COURT: No --

22 MR. DICKSTEIN: -- oh, I'm sorry.

23 THE COURT: -- I mean, it sounds like they're
24 willing to produce documents concerning the acquisition -- or
25 the alleged acquisition of rights to the acquisition of the

1 archives. I mean, are there specifics that you've requested
2 from defendants' counsel --

3 MR. DICKSTEIN: Yeah --

4 THE COURT: -- that they're reluctant to produce?

5 MR. DICKSTEIN: Well, I think the state of the play
6 is that we had an email exchange last week, where we asked
7 generally for due diligence materials, but then also
8 identified two that we're aware of -- or what we would
9 consider due diligence materials; this disclosure letter and
10 then another agreement.

11 I think it was in connection with the acquisition
12 from Plainfield Music. There's (sic) references in that
13 agreement to prior agreements transferring the same
14 recordings. And I think when we spoke on Saturday,
15 Ms. Ranahan said she would look into producing those.

16 MS. RANAHAN: I've looked to see if I already have
17 them. There's been several times, Your Honor, where
18 Mr. Dickstein's identified certain attachments or certain
19 emails that he says are missing. And I've in every instance
20 gone back and produced those to him.

21 He just now Saturday asked me for these two. And I
22 said I'd once again go with my client and see if we have them.
23 Anything in my clients' possession, we've been willing to
24 produce and have produced. So, this is not a live issue
25 before Your Honor. We're absolutely going to --

1 THE COURT: I mean, it doesn't --

2 MS. RANAHAN: -- look into that.

3 THE COURT: -- it sounds -- you know, look, I
4 appreciate that you wanted to get in front of me because we
5 had this conference scheduled for today, but it sounds like
6 they're willing to produce these materials. I mean, it sounds
7 like it's still --

8 MR. SLOTNICK: Yeah.

9 THE COURT: -- that's an active negotiation between
10 the parties.

11 MR. SLOTNICK: Well, we're getting I guess two
12 messages. On one hand, we're hearing that there are maybe
13 some documents referenced in the agreements, that they're
14 willing to go back and look at. And then we're hearing that
15 well, but there's no general due diligence materials.

16 So, I agree, I appreciate counsel's
17 representation --

18 MS. RANAHAN: Well --

19 MR. SLOTNICK: -- we'll have to see what they have,
20 and we'll go, you know, we'll go from there. So --

21 MR. ELKIN: We --

22 MR. SLOTNICK: -- I agree, there may be nothing else
23 for Your Honor to decide now --

24 MR. ELKIN: We're not imposing any objection to
25 this. We're going to produce everything that they've asked

1 for. If it doesn't exist, we have informed them or will
2 inform them. If they want to do something because they don't
3 believe that that's the case, then we can --

4 THE COURT: Okay.

5 MR. ELKIN: -- come back before Your Honor.

6 THE COURT: Okay. All right.

7 MR. SLOTNICK: I think there's one other category
8 within that Roman III, I believe.

9 THE COURT: Go ahead.

10 MR. SLOTNICK: Which is the -- these are the artists
11 -- the deposition transcripts of the artists from the -- I
12 think what we've been calling "the record-label litigation."
13 I think it was actually Grateful Dead who was the named
14 plaintiff, if I'm not mistaken.

15 THE COURT: What litigation, and what did this
16 litigation involve?

17 MR. SLOTNICK: It involved claims -- my
18 understanding, we were not involved in that litigation -- but
19 it involved claims by record labels that they owned the
20 recordings or the copyrights and the recordings that
21 defendants are exploiting. And defense counsel was involved
22 in that case, so they may be able to speak to it better than I
23 can.

24 The reason I'm raising it now, is because at the
25 last conference, Your Honor may recall, Mr. Elkin referenced

1 those deposition transcripts in support of their argument that
2 these artists likely transferred rights to Bill Graham at the
3 time. So, you know, I'd like to see them to see if that's the
4 case. Or if that's not the case, they seem to be relying on a
5 common-practice argument.

6 So, that if, you know, maybe if one -- if there's
7 evidence that one artist granted rights, then they're going to
8 argue that, well, that raises some sort of presumption that
9 other artists did. You know, I don't agree with that, but to
10 the extent they're making that argument, I think we're
11 entitled to see the artists' deposition transcripts. And
12 these are depositions that already occurred. We're not
13 obviously seeking to depose new artists there.

14 THE COURT: Okay.

15 MR. SLOTNICK: So, I think that's been objected to,
16 unless I'm mistaken.

17 MR. ELKIN: I made a comment in response to the
18 questions that the Court asked at the last conference. And I
19 didn't pull out any deposition transcripts. I was trying to
20 make a fair representation as to what I understood to be the
21 potential rationale for the depositions of the non-party
22 witnesses, whose depositions we wanted in a case.

23 This is not the subject, first of all, of any
24 document demand. They queued off on something I said in an
25 argument, which is fine by the way. If they want to have any

1 document demand, we can look at it. But this is like, you
2 know, why don't we just take a look at every single case
3 that's ever been filed against Bill Graham archives and Bill
4 Sagan, and Norton over the past 20 years, and produce all the
5 deposition transcripts.

6 They've taken the position repeatedly in this case
7 that what happened in the -- and they said it last -- two
8 weeks ago before Your Honor -- what happened in that case is
9 completely irrelevant, because that had to do with record
10 labels and music recording, and nothing to do with music
11 compositions.

12 So, because of a comment that I made, they now want
13 to go back and ask for voluminous materials that hasn't even
14 been reduced to any document demand. So, I think it's
15 premature. If they want to serve a document demand, they can;
16 we'll respond to it. But this cropped up in the last --
17 within the last week.

18 THE COURT: All right.

19 MS. RANAHAN: Your Honor --

20 THE COURT: I'm going to come back and I'm going to
21 ask Mr. Dickstein one or two more questions. But before I do
22 that, what was the issue in the litigation in which these
23 artists were deposed.

24 MR. ELKIN: First of all, in the case itself, which
25 goes back some ten years.

1 THE COURT: Uh-huh.

2 MR. ELKIN: It was an action brought by a couple of
3 record labels and a number of artists. I think it included
4 Carlos Santana, the legacy members of the Grateful Dead, the
5 legacy members of The Doors, the estate of Janice Joplin, and
6 maybe some other parties. And what they sought was, among
7 other things, I think there were claims for declaratory relief
8 and then there were claims for --

9 MS. RANAHAN: Right of publicity.

10 MR. ELKIN: Evasions of right of publicity, other
11 types of torts. And honestly, Your Honor, I just don't
12 remember. But some of the issues in the case did impinge on
13 certain of the sound recording rights. We weren't talking
14 about any issues related to synchronization, because at that
15 point, the archive of the client had not exploited any
16 archival video material. That's my recollection.

17 So, the purpose obviously that I intended -- that I
18 walked Your Honor through a couple of weeks ago -- is whether
19 or not to the extent a synchronization consent was required --
20 and we take issue with that in the circumstances -- we were
21 relying on a number of equitable principles and facts in terms
22 of the fact that these recordings have been openly and
23 notoriously exploited over the years with the knowledge -- the
24 copyright owners' rights, together with the songwriters'.

25 But we've also taken the position that we believed

1 -- at least in the case of Bill Graham, and we understand the
2 case was the same with regard to King Biscuit Flower Hour and
3 some of the other entities from whom our clients had purchased
4 these archival recordings -- that the performing artist who
5 may have controlled the music compositions at the time
6 willingly permitted their performance to be recorded by
7 videotape.

8 What I had said frankly was that based on certain
9 depositions that I recall having taken in that other case,
10 that at least with respect to Bill Graham, there was a
11 situation where -- as I recall -- generally, the practice was
12 that Bill Graham had a closed-circuit TV and the anteroom
13 where the artists were hurled up before they actually went out
14 to perform, and were they were to return when they weren't
15 performing, and that the videotaping equipment was in fairly
16 close proximity to where they were performing.

17 And in those circumstances, it would be beyond
18 Corventure that somehow that they were not aware of what was
19 going on. I mentioned all of that, because I was trying to
20 respond to Your Honor's question as to how and what way they
21 could possibly had given their consent.

22 I don't know what happened here. I'm not going to
23 make a representation as to what happened with regard to the
24 individuals here. But I was trying to be responsive to the
25 Court's invitation to make a proffer. I don't remember what

1 was in those testimony -- I can tell you that was sealed. I
2 can tell you after the case, we were required to destroy
3 everything. But this is not even subject of a document
4 demand.

5 MR. DICKSTEIN: Your Honor --

6 MS. RANAHAN: Your Honor --

7 MR. DICKSTEIN: -- I could point out it actually is.
8 I mean, this is Exhibit D to Mr. Slotnick's -- excuse me --
9 December 19 letter, Request No. 7, Page 9 of that exhibit:

10 "All documents concerning the initial recording
11 and subsequent editing if any of any audio footage
12 or video footage embodying any of the musical works
13 by any individual or entity including without
14 limitation Bill Graham."

15 MR. ELKIN: Oh, come on --

16 MR. DICKSTEIN: -- "Bill Graham presents" --

17 THE COURT: Hold on a second --

18 MR. ELKIN: -- come on, seriously --

19 THE COURT: -- hold on -- counsel, counsel, just --

20 MR. DICKSTEIN: [Inaudible] --

21 THE COURT: -- hold on. But I mean, isn't your
22 position here inconsistent with your response to defendants'
23 application at the prior deposition to depose all the
24 recording artists?

25 MR. DICKSTEIN: I think there's a difference between

1 seeking to depose -- to inconvenience the artists and get them
2 from wherever they may be around the world and ask them for
3 production of artists' deposition transcripts that already
4 exist.

5 MS. RANAHAN: Your Honor --

6 THE COURT: Do we know whether or not they exist?

7 This is to Mr. Elkin, I guess.

8 MR. ELKIN: I'm going to defer to Ms. Ranahan,
9 because when the case was over with, I moved on to my next
10 matter.

11 MS. RANAHAN: Your Honor, they were ordered to all
12 be destroyed pursuant to the settlement agreement. So, it's
13 my understanding that no artists' deposition transcripts
14 remain in existence today. And additionally, Your Honor, none
15 of them have anything to do with the artists of the songs at
16 issue. And meanwhile, plaintiffs are objecting to our right
17 to take the artists' depositions regarding songs and
18 plaintiffs at issue.

19 THE COURT: Before we get too far down the road over
20 something where there may be no there there, maybe the initial
21 issue is to find out whether any of these deposition
22 transcripts exist, number one. And if they still exist, who
23 was the deponent? If the transcripts no longer exist in the
24 defendants' possession, custody or control, there's no issue.
25 And if any exist with respect to recording artists who are not

1 the subject of this litigation, there's no issue.

2 MS. RANAHAN: Thank you, Your Honor.

3 THE COURT: So, maybe those two threshold questions
4 should be answered before we find out --

5 MS. RANAHAN: I can tell you who the artists were --

6 THE COURT: -- whether there's any way of finding
7 out -- whether we're arguing about anything here. Okay.

8 MR. DICKSTEIN: All right.

9 THE COURT: All right. All right. The next issue
10 is Roman IV in plaintiffs' letter. I mean, I don't recall
11 specifically what the complaint says here. But does the
12 complaint identify specific recordings?

13 MR. DICKSTEIN: Your Honor, the complaint identifies
14 the works --

15 THE COURT: Specifically?

16 MR. DICKSTEIN: -- compositions. And it also -- and
17 it also identifies the links, right Internet links to the
18 places you could download certain of these -- certain of the
19 recordings of those compositions. That's what we were able to
20 find at that time. As you can imagine, we spent a lot of
21 times -- a lot of time and our paralegals spent a lot of time
22 looking through defendants' website prior to filing the
23 lawsuit.

24 Since then, actually just a couple weeks ago, we
25 realized that there are hundreds of new concert recordings on

1 the defendants' website that we had not seen before. And
2 we've put those all in a spreadsheet that we sent to
3 defendants last week, I believe, this is Exhibit C to our
4 December 19 letter. And we're just, you know -- frankly, I
5 think it's defendants' obligation to supplement their
6 discovery responses in the normal course. We're pointing out
7 that they haven't done that.

8 THE COURT: But these are not recordings of concerts
9 that were the subject of the complaint; is that right?

10 MR. DICKSTEIN: No, I'm sorry, Your Honor. These
11 are the same songs. These are different performances of the
12 same songs.

13 THE COURT: Do you have a copy of your complaint --
14 of the complaint?

15 MR. DICKSTEIN: I'm not sure I have a clean one.
16 Can I just take a look at that for one second,
17 please?

18 I'm going to ignore any handwritten notations. I
19 probably won't be able to read them anyway.

20 THE COURT: All right. And the complaint identifies
21 specific links to the infringing -- to what the allege
22 infringements?

23 MR. DICKSTEIN: That's right. There's an exhibit, a
24 lengthy spreadsheet attached, yeah.

25 THE COURT: Yeah. Well, why is defendant incorrect

1 that to get this discovery, you've got to amend your
2 complaint?

3 MR. DICKSTEIN: I'm sorry? I didn't understand the
4 question.

5 THE COURT: Oh, sure. If I understand the
6 defendants' position correctly, they're saying before you can
7 get this discovery, you've got to amend the complaint to add
8 these infringements. Why are they incorrect in that regard?

9 MR. DICKSTEIN: Well, because the -- as I think
10 you'll see, the complaint is written in a way that we allege
11 infringements of certain musical works. And if there are
12 multiple instances of those musical works, then they're all at
13 issue.

14 These are on websites owned and controlled by
15 defendants. They're apparently during the lawsuit. They have
16 no qualms about putting up new recordings that embody these
17 same musical works. There's been quite a bit of discovery the
18 defendants have produced concerning when recordings are put up
19 on their website, when they were downloaded.

20 We have some issues with that, which maybe we'll get
21 to today. But we have none of that information with respect
22 to these 250 new concert recordings that have been put up.
23 And, you know, Your Honor, we could either seek to amend our
24 complaint or file a new lawsuit to allege these. That seems
25 to be uneconomical. I think in accordance with defendants,

1 you know, obligation under the federal rules, they should just
2 supplement their discovery responses.

3 THE COURT: And what do defendants say?

4 MS. RANAHAN: Your Honor, we just received this list
5 mid last week. Our position is, these were not infringing
6 concerts at issue in the complaint or listed in the complaint.
7 There were specific concerts put into the complaint, and
8 that's what we've based this whole case around, and all of our
9 discovery, and discovery for the last -- almost a year now.

10 It's very late in the case. If they feel the need
11 to seek to amend, or --

12 THE COURT: Well --

13 MS. RANAHAN: -- filing a new lawsuit, then that's
14 fine. But it's not -- this isn't the right venue to try to
15 try to expand the scope of their action through this discovery
16 request.

17 THE COURT: Well, the complaint -- I'm just looking
18 at the complaint here -- and it does refer to Exhibit A as a
19 non-exhaustive list. For example, Paragraph 9, a
20 non-exhaustive list of web links to defendants' infringing
21 website Music Vault that contain unauthorized uses of
22 plaintiffs' musicals works as included in Column 4 of
23 Exhibit A. And there are similar statements of
24 non-exclusivity in Paragraphs 74, 82, and 89.

25 MS. RANAHAN: Your Honor, we're not even clear --

1 THE COURT: I mean, I'm not sure what the more
2 efficient vehicle is here. I mean --

3 MS. RANAHAN: Well, we're not -- I'm not even clear
4 what website these came from. If it's the new website that
5 plaintiffs are trying to now add to the case. And I've asked
6 plaintiff that. And I'm happy to continue to meet and confer
7 with them. We again, got this late last week for the first
8 time, 200 works that got, you know, shoved into this discovery
9 hearing.

10 We haven't had the time to thoroughly go through
11 this with our client. At this point, we're not prepared today
12 to stipulate to allow all these, or willing to agree that all
13 of these are appropriate. We don't know enough at this point.

14 THE COURT: I mean, Mr. Dickstein, it looks like
15 your email was sent Friday at 12:30?

16 MR. DICKSTEIN: That's right, Your Honor.

17 MR. SLOTNICK: Yeah.

18 MR. DICKSTEIN: And I would just point out, I did
19 note in that email where we found these additional concert
20 recordings. It was on the wolfgangs.com website, which
21 Ms. Ranahan alluded to is a new website that they've launched
22 I think during the last month, as well as the concert
23 vault.com website, which is something they've been operating
24 since the beginning of the case.

25 THE COURT: Well --

1 MS. RANAHAN: So then, it does sound like --

2 THE COURT: -- look, I mean --

3 MR. ELKIN: Your Honor, if I may be heard --

4 THE COURT: -- did you try --

5 MR. ELKIN: -- let me interrupt for one second.

6 With respect to the new recordings, it sounds like the parties
7 need to meet and confer on that some more. I mean, it sounds
8 like the matter was just raised a few days ago. And from what
9 I'm hearing Ms. Ranahan say is, that they want -- defendant
10 wants to confer with their client about these 250 -- or
11 whatever the number is -- recordings. Which given the
12 shortness of time between when the issue was raised and today,
13 seems like a reasonable response.

14 MR. DICKSTEIN: Understood, Your Honor.

15 THE COURT: Okay.

16 MR. SLOTNICK: Your Honor, if I may just put some of
17 this in context?

18 THE COURT: Yeah, go ahead.

19 MR. SLOTNICK: On the one hand, there is a pleading
20 issue, and on the other hand there is I think a legitimate
21 discovery issue right here. We could I suppose bring a new
22 lawsuit with these same songs, and these new concerts. But if
23 we were to do that, we would be entitled to statutory damages
24 on the same songs for these new concerts.

25 Defendants were concerned the other day about a

1 \$30-million verdict. Now, they seem to be okay with us going
2 \$150,000 times another 80. We're trying to avoid that. You
3 know, we think that as long as it's in this lawsuit, it's
4 probably subject to this same one claim, one infringement.
5 But we think it's also relevant here to show willfulness.
6 Because if the defendants continued to utilize plaintiffs'
7 songs with knowing full well that there were claims against
8 them and a litigation against them, we think that would be --
9 it would go far towards proving, you know, our claim of
10 willfulness.

11 THE COURT: All right. Hold on --

12 MR. SLOTNICK: And let me --

13 THE COURT: Go ahead, go ahead.

14 MR. SLOTNICK: -- let me just -- okay.

15 THE COURT: Go ahead.

16 MR. SLOTNICK: Okay. One further aspect of this is
17 if the plaintiffs were to prevail in this lawsuit, and prove
18 infringement, presumably that would require the defendants to
19 pull down or take off of their sites, not only the concerts
20 that were identified, but any other concerts that utilized
21 these words. I mean, we would think that would be a given.

22 What we're trying to do is combine everything in one
23 place. It's more economical. It may be less advantageous on
24 a damage level for us. You know, we can start, you know, a
25 separate lawsuit for each song for each different concert.

1 But that would seem to be a waste of everybody's time and
2 problematic. What we're trying to do here is be efficient.
3 If defendants need to confer with their clients about this, we
4 totally understand. But we do want to understand, you know --
5 them to understand where we're coming from on this. We're not
6 trying to be difficult, we're trying to be economical.

7 MS. RANAHAN: And I appreciate Mister --

8 THE COURT: Let me cut to the chase -- and I'm not
9 trying to cut you off, Ms. Ranahan, but I have a -- my
10 proposal is something that I think makes sense, I'm not sure
11 anyone will object to it. How long do you need to confer with
12 your client to give a firm answer with respect to, do you want
13 to -- with respect to whether or not you want to provide
14 discovery with respect to the additional concert recordings
15 without an amendment to the pleading?

16 MR. ELKIN: Two weeks, Your Honor.

17 THE COURT: All right. All right. So, that's going
18 to be January 3rd.

19 MR. ELKIN: Can we get to the end of that week? I
20 didn't --

21 THE COURT: All right.

22 MR. ELKIN: -- look at my calendar --

23 THE COURT: January 6th. Okay.

24 MR. ELKIN: Thank you.

25 THE COURT: And can you also by January 6th, give an

1 answer -- give a response with respect to the artists'
2 depositions, whether they still exist; and if they still
3 exist, which artists' depositions you still have?

4 MR. ELKIN: Certainly, Your Honor.

5 THE COURT: Okay. So, January 6th, with respect to
6 the -- for response concerning the depositions and the new
7 concert recordings.

8 And does that -- did you want to say something else,
9 Mr. Elkin?

10 MR. ELKIN: I just want to say I appreciate
11 Mr. Slotnick looking out for us. But the reality is that, he
12 knew -- he knows -- or we know, the American people know, that
13 if he -- this was not squarely the case already, he wouldn't
14 even be coming before you with regard to this, he'd be making
15 an application for sanctions.

16 The bottom line here is that they are presuming as
17 if there have been infringements in this case. We have
18 complied with the copyright laws, period. And issues of
19 willfulness and copyright infringement, that's all remained to
20 be seen. We have adequate defenses. And the good Lord
21 willing, we will prevail on those defenses.

22 THE COURT: All right. We have a few more issues to
23 discuss here.

24 MR. DICKSTEIN: Yeah, I think -- Your Honor, I think
25 we're up to V --

1 THE COURT: Yeah.

2 MR. DICKSTEIN: -- of our letter that, you know,
3 defendants did produce some information related to the
4 corporate entities' profits and expenses. They didn't produce
5 anything with respect to Mr. Sagan's profits, revenues from
6 the infringement. He's alleged to be the owner and controller
7 of the companies which run the various websites.

8 And in particular, you know, one concern we have is,
9 there's a very large expense entry in the corporate
10 defendants' profit and loss statements, several million
11 dollars that relates to a "other" category, as well as I think
12 it's personnel or payroll, something like that.

13 To the extent a large chunk of that is going to Mr.
14 Sagan and the defendants are going to seek to deduct from
15 disgorgement of profits, I think we're entitled to recover
16 that, you know, on that other end from Mr. Sagan. So, we just
17 don't have any information into his finances derived from
18 these companies.

19 MS. RANAHAN: Your Honor, to the extent we're
20 intending to deduct any of those other expenses we're planning
21 to produce additional documents before the end of the month to
22 substantiate those. So, this is again an issue raised very
23 recently. It has no -- Mr. Sagan's individual finances really
24 has no bearing on disgorgement of profits. But we will, if we
25 plan to deduct those from disgorgement, we will demonstrate

1 what those other expenses are.

2 THE COURT: All right. And you're going to -- you
3 said by the end of the month. That's 12/30, 12/30 I guess,
4 December 30th?

5 MS. RANAHAN: Yes, Your Honor.

6 MR. ELKIN: And I thought, Your Honor, we were
7 before you two weeks ago. There's an issue about whether
8 they're going to elect statutory damages or compensatory
9 damages --

10 THE COURT: Yeah.

11 MR. ELKIN: Compensatory damages clearly has within
12 its purview the issue of disgorgement or however they're
13 characterizing that. Well, it's not before you today, because
14 you were going to take it either under advisement or have
15 another argument with regard to our motion for
16 reconsideration. But I thought the Court was fairly clear in
17 the last hearing with respect to the election. They refuse to
18 make the election.

19 MR. DICKSTEIN: Yeah, Your Honor, if we could be
20 heard? I think at the last conference the concern was, I
21 think that Your Honor had -- if I'm saying this correctly --
22 was that some of defendants' document requests could
23 potentially -- with respect to licenses, and revenues -- could
24 potentially be relevant if plaintiff were seeking to recover
25 their actual damages, in terms of plaintiffs' losses. We've

1 notified defense --

2 THE COURT: I mean, my concern was whether or not --
3 whether or not you were seeking statutories or actuals?

4 MR. DICKSTEIN: Well, so --

5 THE COURT: And in Footnote 4 of your letter, you
6 really don't answer that question.

7 MR. DICKSTEIN: Well, I think the issue is, in part
8 of actual -- in the comparative act -- actual damages consist
9 of plaintiffs' losses, but also disgorgement of defendants'
10 profits. So --

11 THE COURT: Yeah.

12 MR. DICKSTEIN: -- we would still --

13 THE COURT: And what I want -- and what I was hoping
14 for was an election as to whether or not you were going to
15 seek statutory or you wanted to keep the door open to
16 something else?

17 MR. SLOTNICK: Your Honor, if I may?

18 THE COURT: Go ahead.

19 MR. SLOTNICK: Once Ms. Ranahan advised us of the
20 lack of registrations for some of the songs, and it eliminate
21 -- would eliminate statutory damages potentially, then at
22 least with respect to those works, we would like to leave the
23 door open to disgorgement of plaintiffs' profits --
24 defendants' profits.

25 To the extent that, you know, we're looking at these

1 registrations -- and I think we should have all of them
2 hopefully within the month -- you know, that may become a moot
3 issue as well. So --

4 THE COURT: All right.

5 MR. SLOTNICK: -- well defer to that if you don't
6 mind?

7 THE COURT: All right.

8 MS. RANAHAN: Your Honor, we would just request that
9 you keep that in mind when reconsidering our issue on the four
10 Internet agreements.

11 THE COURT: Okay.

12 MS. RANAHAN: Thank you.

13 THE COURT: Roman VI.

14 MR. DICKSTEIN: Right, Your Honor. As I mentioned
15 earlier, defendants had produced voluminous spreadsheets that
16 relate to various data about the recordings that are up on
17 their website. One of those spreadsheets is the date when
18 each recording was downloaded. And I --

19 THE COURT: And I understand the issue here in --

20 MR. DICKSTEIN: Okay.

21 THE COURT: -- Section 115.

22 MR. DICKSTEIN: Right.

23 THE COURT: Their representation is that they have
24 no documents.

25 MR. DICKSTEIN: Your Honor, I have to say it's hard

1 to believe that just coincidentally they have this data that
2 goes up to exactly three years before the lawsuit was filed.

3 THE COURT: Well, I'm not sure that's what they're
4 saying. Or maybe it is. Let me look at the letter again.

5 "The parties have discussed this" -- this is defendants'
6 letter:

7 "The parties have discussed this multiple
8 times, and plaintiffs simply refuse to accept that
9 defendants have no documents to reflect this
10 information. It is unclear why plaintiffs even need
11 this information as they already represented to the
12 Court in their letter of December 6th, that
13 documents produced in discovery reveal that in
14 virtually every instance, defendants reproduced and
15 exploited the concert recordings more than 30 days
16 before sending applicable NOI.

17 Based on this representation, plaintiffs
18 apparently have all the information they need to
19 make the point they intend to make with this
20 information. In any event, as defendants have
21 explained, they do not have information about the
22 date of first download for the recordings that go
23 passed three years. While defendants preserved such
24 data when this lawsuit was filed, there is no
25 information that would satisfy this request that

1 remains in defendants' possession, custody or
2 control. And defendants are not obligated to create
3 new documents that do not exist, especially
4 documents that precede the dates upon which
5 plaintiffs' damages are limited by the three-year
6 statute of limitations."

7 So, am I understanding the defendants to say that
8 the document preservation order that was issued when the
9 action was commenced, went back precisely three years before
10 the commencement date?

11 MS. RANAHAN: Well, what we have is the revenue
12 information from that time. We don't have date of first
13 downloads. We don't -- we have it for recent times. We have
14 revenue information. But we don't what they've asked for,
15 which is a date of first download. We just don't have it. To
16 the extent that happened more recently, and that was reflected
17 in what we have produced, we have that. We just don't have it
18 going passed three years.

19 THE COURT: All right.

20 MR. DICKSTEIN: Maybe it would just help, Your
21 Honor --

22 THE COURT: I mean, there's case law that says when
23 -- you know, we're on the record here as the sign on your
24 tables indicate -- and there's representation not only on the
25 record here, but there's also the representation in the letter

1 from defendants of today, Docket Item 60, that the documents
2 don't exist and are not in their possession, custody or
3 control. You know, unless you have evidence that that
4 representation is inaccurate, the representation by counsel,
5 the documents don't exist ordinarily ends the issues.

6 This sort of suspicion that there's got to be
7 something out there, is not enough to warrant an order to
8 compel production. There's --

9 MR. DICKSTEIN: I understand that, Your Honor.

10 THE COURT: -- case law --

11 MR. DICKSTEIN: -- and maybe we'll have to go at
12 this another way. I would just point out that one of the
13 spreadsheets that defendants produced has this order date,
14 which is the date when the applicable recording was
15 downloaded, which starts on 5/27/2012 and it goes on for
16 thousands of line after that.

17 But if defendants are representing that everything
18 before that was destroyed before there was anticipation of
19 litigation, then we'll have to deal with this in another
20 manner.

21 THE COURT: All right. Okay. Look, you know, the
22 Court -- the next issue concerns a refusal to enter into a
23 stipulation. I mean, the Court can't issue an order directing
24 someone to stipulate to something.

25 MR. DICKSTEIN: I understand that, Your Honor. I

1 thought maybe as part of discussions here, we could all agree
2 that this stipulation would be the most efficient way to
3 proceed. But if we need to move to supplement, well, that's
4 what we'll do.

5 THE COURT: Well, yeah. And the witness -- the
6 scheduling issue is still an issue? I thought the letter from
7 today --

8 MS. RANAHAN: Your Honor, when I spoke to
9 Mr. Dickstein on Saturday, we were with the agreement that
10 we'd schedule defendants' depositions in late January, early
11 February. I'm not sure why this made it into the letter.

12 MR. DICKSTEIN: Well, that's fine. But I think we
13 should start talking about dates now. I don't want to wait
14 until that time.

15 MR. ELKIN: I don't think we --

16 THE COURT: Well, you can do that without my
17 presence. And if you can't come to an agreement, I'll dictate
18 dates. You know, you don't need me to mediate the discussion
19 between the two of you concerning deposition dates.

20 Ordinarily, you know, in 99 percent of the cases,
21 counsel agree on deposition dates. If you can't, I will
22 dictate a date, and that date will be it; unless someone's got
23 surgery or something of similar magnitude scheduled.

24 MR. DICKSTEIN: I appreciate that, Your Honor.
25 We've been trying to talk with them since October, but we'll

1 continue to do so.

2 THE COURT: All right. Well, if there's a failure
3 to talk about this, you can raise it. But it sounds like
4 they're willing to talk about it.

5 MR. ELKIN: I do, Your Honor --

6 THE COURT: Let me --

7 MR. ELKIN: -- I'm happy to personally participate
8 in discussions --

9 THE COURT: Okay.

10 MR. ELKIN: -- with counsel. The one thing I would
11 point out that gives me some pause -- at least with respect to
12 where it's relevant -- one-third of the subject matter of
13 their complaint now is potentially subject to these
14 registrations that Mr. Slotnick says is going to be produced.
15 So, we're going to schedule depositions, but I just caution
16 the parties, when we do have that, that we need to get some
17 comfort around that, so we don't -- so it would be efficient.

18 THE COURT: All right.

19 MR. DICKSTEIN: Your Honor, I have the list here.
20 I'll give it to them as we're leaving.

21 THE COURT: All right. Let me go off the record for
22 a minute.

23 THE CLERK: Sure.

24 THE COURT: For a second?

25

1 [Pause in proceedings.]

2 THE COURT: Okay. We're back on the record. Yeah,
3 we just had an off-the-record discussion. I've asked counsel
4 to maybe get back to me some time in early January as to
5 whether or not a settlement conference before me makes sense.
6 They're going to talk to their clients and to each other, and
7 see what we can do. All right.

8 Anything else we should be considering from
9 plaintiffs' point of view today?

10 MR. DICKSTEIN: No, Your Honor.

11 THE COURT: Oh, one other thing, when do you want to
12 respond to defendants' motion for reconsideration? Since you
13 just got it this morning, I wasn't going to -- and I really
14 haven't had a chance to study it -- I didn't want to discuss
15 it today. But maybe you want to put something in?

16 MR. SLOTNICK: Some time early next week, Your
17 Honor?

18 THE COURT: Well, do it the week after, because I'm
19 not going to be here for much of next week, so.

20 MR. SLOTNICK: Better yet.

21 THE COURT: Do it the week after.

22 MR. SLOTNICK: Thank you.

23 THE COURT: And, you know, any time the week after,
24 I'm not trying to ruin Mr. Dickstein's holidays. So, it
25 doesn't have to be the Monday after New Year's. If it's

1 toward the end of that week, that's absolutely fine.

2 MR. DICKSTEIN: Thank you, Your Honor.

3 MR. SLOTNICK: Thank you, Your Honor.

4 THE COURT: Okay. All right.

5 Anything else from defendants?

6 MR. ELKIN: No, Your Honor.

7 THE COURT: Okay.

8 MR. ELKIN: Happy holidays.

9 THE COURT: Thank you, all. Same to you all. I
10 hope you all have a great New Year -- a great holiday season
11 and a great New Year.

12 MR. ELKIN: Thank you.

13 THE COURT: These go back to Mr. Dickstein. Okay.

14 MR. DICKSTEIN: Thank you.

15 [End of recording.]

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 Shari Riemer, CET-805

7 Dated: December 22, 2016

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